Supreme Court, U. S.
FILED
SEP 25 1980
MICHAEL RODAK, JR., CLERK

80-473

NO._____

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioner

v.

VIOLET JO EVANS, INDIVIDUALLY AND AS TEMPORARY ADMINISTRATRIX OF THE ESTATE OF PAUL DAVID EVANS DECEASED, ET AL,
Respondents

PETITION FOR WRIT OF CERTIORARI

To The Court Of Civil Appeals For The First Supreme Judicial District Of Texas

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QUESTION PRESENTED

Is the Due Process Clause of the 14th Amendment violated by the entry of an order striking all pleadings and defenses following notice and hearing on a motion not seeking such relief?

LIST OF PARTIES

Petitioner—Southern Pacific Transportation Company.

Respondent—Violet Jo Evans, Individually and as Temporary Administratrix of the Estate of Paul David Evans, Deceased, and as the legal and personal representative of all beneficiaries, including herself as the surviving wife of Paul David Evans, Deceased, and Sandra Coker, Janice Cain, Paul David Evans, Jr., and Brenda Evans.

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OPINION BELOW

The opinion of the Court of Civil Appeals for the First Supreme Judicial District of Texas, rendered on October 25, 1979, is reported in 590 S.W.2d 515.

JURISDICTION

The judgment of the Court of Civil Appeals for the First Supreme Judicial District of Texas was entered on October 25, 1979. The Court of Civil Appeals denied Petitioner's Motion for Rehearing on November 29, 1979. The Supreme Court of Texas "refused, no reversible error," Petitioner's Application for Writ of Error on May 28, 1980, and overruled Petitioner's Motion for Rehearing on June 25, 1980, making final the decision of the Court of Civil Appeals.

The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. § 1257(3), because a right specially set up and claimed under the United States Constitution is asserted by Petitioner herein.

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision involved in this case is the Due Process Clause of the 14th Amendment, which provides in pertinent part as follows: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

This lawsuit was filed by Respondents in a state district court of Harris County, Texas. During the pre-trial stage of this case, Petitioner failed to file timely answers to interrogatories. Respondent filed a Motion to Compel

Answers to Interrogatories, and on September 2, 1977, the district court entered an order granting that motion (App. B). That order required Petitioner to answer Respondent's interrogatories within thirty days, and further ordered that if Petitioner failed to file answers to interrogatories by such date, "the pleadings of [Petitioner] shall be struck and [Petitioner] shall not be permitted to present any grounds of defense . . ." (App. B). On March 31, 1978, Petitioner filed its answers to interrogatories.

On November 27, 1978, months after the answering of the interrogatories and after the completion of substantial other pretrial discovery, Petitioner's motion to set aside the order of September 2, 1977, was set down for hearing. That motion was the only motion set to be heard at that hearing, and Petitioner had no notice that any other motion was scheduled to be considered at that hearing. In particular, there was no notice that any motion filed on behalf of Respondent seeking the imposition of sanctions against Petitioner was set to be heard at the November 27, 1978 hearing. The district court overruled Petitioner's motion. However, in addition to overruling that motion, the order entered by the district court went on to state that "[Petitioner's] pleadings in this cause are struck and [Petitioner] shall not be permitted to present any grounds of defense in this cause." (App. C).

Throughout the time period during which the interrogatories were unanswered, Petitioner's counsel of record was experiencing severe psychiatric problems. A psychiatrist by whom said counsel was treated diagnosed those problems as depression, a recognized psychiatric condition that includes as one of its symptoms the failure to carry out tasks which an individual is responsible for perform-

ing. It is Petitioner's contention that the cause of its failure to answer the interrogatories within the time prescribed by the September 2 order was its counsel's mental condition during that period.

Had Respondent filed a motion for sanctions to be heard at the November 27, 1978 hearing, Petitioner would have been obliged under Texas law to present evidence concerning the condition of its counsel and the relation of such condition to its failure to answer the interrogatories. That obligation would have been imposed by Rule 168 of the Texas Rules of Civil Procedure, which provides that "except for good cause shown" discovery sanctions may be imposed upon a party which fails to serve answers to interrogatories. Rule 168 also provides that such sanctions may only be imposed "on motion and notice." In the absence of a motion on behalf of Respondent set to be heard at the November 27 hearing, Petitioner had no notice that it was being called upon to make a good cause showing and adduce evidence concerning its counsel's condition.

The first stage in the proceedings at which Petitioner raised its claim of no notice was at a hearing conducted on November 29, 1978, in the district court's chambers in which Petitioner asserted that it had no notice that a motion seeking the imposition of sanctions was set for the November 27 hearing and that the only motion set to be heard was Petitioner's motion. (The transcript of this assertion is at pp. 3-5 of Exhibit E to Defendant's Motion for Reconsideration, which is a part of the appellate record in this case.) The district court nonetheless entered its order striking Petitioner's pleadings (App. C). Petitioner next raised this complaint in Point of Error No. 3 in its brief in the Court of Civil Appeals, where

Petitioner stated that "the district court erred and abused its discretion in entering the order of November 29, 1978, in which it ruled that [Petitioner's] pleadings 'are struck and [Petitioner] shall not be permitted to present any grounds of defense.'" In its Motion for Rehearing in the Court of Civil Appeals, Petitioner again raised its complaint regarding failure to receive notice and a violation of the Due Process Clause. The Court of Civil Appeals affirmed the judgment of the district court and overruled Petitioner's Motion for Rehearing. Petitioner also raised this contention at pp. 10-13 of its Application for Writ of Error in the Supreme Court of Texas, pp. 6-14 of Petitioner's Reply to Respondent's Reply to Application for Writ of Error, and pp. 3-9 of Petitioner's Motion for Rehearing of Application for Writ of Error. The Supreme Court of Texas refused Petitioner's Application for Writ of Error, and overruled Petitioner's Motion for Rehearing.

REASONS FOR GRANTING THE WRIT

It is by now well settled law that the Due Process Clause of the 14th Amendment applies to state judicial action. *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673, 680 (1930). It is equally well settled that the Due Process Clause imposes in state civil litigation certain minimum procedural prerequisites as a part of procedural due process, including principally notice and the opportunity to be heard. *Fuentes v. Shevin,* 407 U.S. 57 (1972); *North Georgia Finishing, Inc. v. Di-Chem, Inc.,* 419 U.S. 601 (1975). The instant case squarely affords this Court the opportunity to decide the nature and content of the hearing and notice which must be provided in a civil action prior to the entry of a default judgment or its equivalent. Are the notice and hearing

guaranteed by the Due Process Clause constitutionally required to have a reasonable nexus with the matters actually adjudicated?

In the instant case, after a hearing on the motion of Petitioner to vacate an order later adjudged void (*see* p. 11, *infra*), the trial court, without additional notice or hearing of any kind, entered an order striking all pleadings and defenses of Petitioner—in effect defaulting Petitioner as to liability. Given the absence of any pending motion seeking such extraordinary relief and scheduled to be heard at the time of the hearing preceding the court's order, Petitioner was deprived of any opportunity to show why its interrogatory answers had been unduly delayed. If given the opportunity, Petitioner would have adduced evidence at the hearing that its counsel, a long-time and respected member of the bar, had, unknown to it, experienced severe psychiatric problems which precluded his day-to-day functioning; that the interrogatories were answered when the problem was discovered (long prior to the entry of the default order); and that Respondent was not prejudiced by the delay.

While the Court in recent years has spoken on numerous occasions to the necessity for procedural due process, including notice and hearing, it has seldom, if ever, articulated the nature of the notice and hearing required. *Cf. Goldberg v. Kelly*, 397 U.S. 254 (1970); *Boddie v. Connecticut*, 401 U.S. 371 (1971). And it has never done so in recent years in the most familiar and generally applicable context of state civil litigation, as opposed to more arcane and limited areas such as welfare benefits, parole revocation or provisional pretrial remedies.

In the instant case, although notice and hearing occurred prior to the November 28, 1978 order, they bore

no relationship to the extraordinary order entered and afforded neither notifcation sufficient to prevent unfair surprise nor an opportunity to be heard or to present evidence with respect to such order on the issues relating thereto. *Compare Aetna Ins. Co. v. Hartshorn,* 477 F.2d 97 (5th Cir. 1973).

Because the only motion set to be heard on November 27 was Petitioner's motion to set aside the September 2, 1977 order, there were, so far as Petitioner was aware, only two possible outcomes to the hearing on Petitioner's motion—(1) the court could have granted the motion, thus setting aside the portion of the September 2, 1977 order containing language regarding the future imposition of sanctions; or (2) the court could have overruled the motion, thus allowing the September 2, 1977 order to remain in existence with whatever effect, if any, that order may have had. However, the order actually entered by the court did not merely overrule Petitioner's motion. Instead, the court went on to effectively impose upon Petitioner the discovery sanctions of striking Petitioner's pleadings and precluding Petitioner from presenting any grounds of defense.

In the absence of a motion seeking the imposition of sanctions and in the absence of notice that such a motion was to be heard on November 27, Petitioner was unaware of any necessity that it make the "good cause" showing required by Tex. R. Civ. P. 168 to explain its failure to answer the interrogatories. Armed with such notice, Petitioner could have made a good cause showing by establishing that the failure to answer the interrogatories was caused by the incapacity of Petitioner's attorney of

record at the time in question. This was an altogether different showing from what was necessary for Petitioner to prevail on its motion to set aside the September 2, 1977 order, as that motion essentially went only to the legal validity of the September 2 order.

Although implicit in this Court's decisions, the Court has never expressly stated that the notice and hearing due under the 14th Amendment must expressly, fairly and reasonably offer the opportunity to be notified as to the issues to be adjudicated and the relief at issue. As Justice Jackson recognized in *Mullane v. Central Hanover B. & T. Co.*, 339 U.S. 306, 313, 314 (1950):

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case . . . [The] right to be heard has little reality or worth unless one is informed that the matter is pending. . . .

A basic principle of justice is ". . . that a reasonable opportunity to be heard must precede judicial denial of a party's claimed rights." *New York v. New York, N. H. & H. R. R.*, 344 U.S. 294, 297 (1953). And the opportunity to be heard ". . . is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

Unless the hearing and notice due under procedural due process are required to embrace sufficient notification to avoid unfair surprise and reasonable opportunity to respond with respect to the issues actually adjudicated

and relief sought, then procedural due process is a hollow shell without meaning, easily circumvented through avoidance of any reasonable nexus between the matter actually adjudicated and the form engaged in. In the instant case, the trial court may have "considered the events which had occurred from the beginning of the suit until that date," 590 S.W.2d at 518, but, if it did so, it did so without opportunity to Petitioner to present controverting facts or even know that it was engaged in such consideration. Under such circumstances, its adjudication was in violation of the 14th Amendment since due process of law requires "a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial." *Ex Parte Wall,* 107 U.S. 265 (1885).

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

OPINION OF COURT OF CIVIL APPEALS

NO. 17427

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Appellant

v.

VIOLET JO EVANS INDIVIDUALLY & TEMPORARY ADMINISTRATRIX OF THE ESTATE OF PAUL DAVID EVANS, DECEASED,
Appellee

On Appeal from the District Court of
Harris County

Southern Pacific Transportation Company appeals from orders of the trial court striking its pleadings, refusing to allow it to present any ground of defense, and granting a default judgment against it as to liability.

The issue in the case is whether the entry and enforcement of these orders constituted an abuse of discretion by the trial court.

Paul David Evans, an employee of appellant, was killed on April 18, 1976, when a motorcar in which he was riding derailed. There were no witnesses to this incident. In May of 1977, suit was filed, alleging, among other things, that the motorcar was defective.

On June 21, 1977, interrogatories were served on appellant, pertaining to the accident and the motorcar. Appellant neither answered the interrogatories within the time required nor objected to them. On July 18, appellee filed a motion to compel answers to these interrogatories. On August 22, a hearing was held and although notified, appellant did not appear. On September 2, the court signed an order requiring appellant to answer the interrogatories within thirty days. The order further provided that the pleading of appellant would be stricken and that it would not be allowed to present any ground of defense if it failed to answer the interrogatories within thirty days. Appellant did not answer the interrogatories, file a motion to extend time, or file any objection to them.

Pursuant to notice, appellee, on November 18, 1977, attempted to take the deposition of Norris Hastings, appellant's claim agent. On the advice of counsel, Mr. Hastings refused to answer many questions pertaining to the motorcar. On March 31, 1978, appellant answered certain of the interrogatories propounded by appellee on June 21, 1977. One of the answers stated that the motorcar had been dismantled and salvaged for spare parts.

On July 31, 1978, appellant's motion to set aside the order striking its pleadings and appellee's motion for interlocutory default judgment were set for hearing and were taken under advisement. On November 29, the court overruled appellant's motion to set aside and ordered the pleadings stricken. On December 4, the court granted appellee's motion for interlocutory default judgment. On December 11, after a hearing, the court entered an order denying appellant's motion to reconsider the granting of a default judgment. Trial as to damages only

was to a jury, which resulted in a total award of $233,-000.00 against appellant.

Appellant's points of error one and two allege that the trial court erred and abused its discretion in entering the order of September 2, 1977, and in refusing to set it aside.

Appellant was ordered to answer the interrogatories within 30 days from September 2nd, 1977. The last paragraph of the order reads:

> "Ordered by the court that the pleadings of Defendant, Southern Pacific Transportation Company, shall be struck and Defendant, shall not be permitted to present any grounds of defense if Defendant fails to file its answers to these interrogatories by such date." (thirty days from September 2nd).

The order of September 2, 1977, did not impose sanctions, but placed the appellant on notice of the sanction to be imposed.

An order that is so uncertain as to require fact findings of a court or jury to determine the relief it grants is void. Hilatex, Inc., v. State, 401 S.W.2d 269, (Tex. Civ. App.—Houston 1966, writ ref. n.r.e.); 39 Tex. Jur. 2d Motions and Orders § 12 (1962). Before any sanctions could be imposed, a finding by the court would have to be made that the interrogatories were not answered within the 30 day period. In addition, depending on what transpired during the following 30 day period, the court would have to determine whether the interrogatories were answered, or whether good cause existed for failing to answer.

Since no order was entered on September 2, 1977, striking appellant's pleadings or refusing it the right to

present any ground of defense, these points are overruled.

Appellant's point of error three asserts that the court erred and abused its discretion in entering an order "striking appellant's pleadings and prohibiting it from presenting any grounds of defense." On November 29, 1978, an order was entered which stated in part, "that this court's order entered on September 2, 1977, is not set aside and that Defendant's pleadings in this cause are struck and Defendant shall not be permitted to present any grounds of defense." This order was legally sufficient to impose the sanctions promised in the September 2, 1977, order.

Throughout the proceedings, appellant never alleged that the interrogatories were not answered because of mistake, lack of information, lack of notice, or even neglect. The only inference which can be drawn is that its failure to answer was willful.

Rule 168, T.R.C.P. states:

> "If a party, except for good cause shown, fails to serve answers to interrogatories, the court in which the action is pending may, on motion and notice, make such orders as are just, including those authorized by paragraph (c) of Rule 215a.

Rule 215a(c), T.R.C.P. provides that the court may

> ". . . strike out all or any part of the pleading of that party (failing to answer), or dismiss the action or proceeding or any part thereof, or direct that such party shall not be permitted to present his grounds for relief or his defense, or enter a judgment by default against that party, or make other orders with respect thereto as may be just."

The only limitation imposed on the court in these two rules is that that the order must be just. Just is defined as "Conforming to or consonant with, what is legal or lawful, legally right; Reasonable. Right; in accordance with law and justice." Black's Law Dictionary, Fourth Edition. The statute makes such sanctions of striking pleadings and not allowing a party to present a ground of defense legal, therefore, the only concern is whether these sanctions were reasonable. Appellant contends that since discovery was eventually made and since it is a settled principle in Texas that the purpose of sanctions under Rule 215a(c) is to secure compliance with the discovery rules and not to punish, that there was no valid reason for invoking sanctions. We disagree.

Appellee's interrogatories were not answered until almost six months (March 31, 1978) after the time had expired under the order of September 2, 1977. The answers revealed that the motorcar, on which the deceased was riding at the time of his death, had been dismantled.

Appellee contends that the failure of appellant to timely answer the interrogatories and the dismantling of the motor car prevented her from proving, and deprived her of the right to attempt to prove, that the motorcar was defective. Appellant contends that the motorcar was scrapped on June 18, 1976, which was before notice was given that appellee was making a claim for the death of her husband. Neither the determination of whether the motorcar was scrapped before the interrogatories were propounded, nor the fact that the interrogatories were eventually answered is determinative of whether the sanctions imposed were just. All of the evidence must be considered.

The November 29, 1978, order was entered after the trial court had considered the events which had occurred from the beginning of the suit until that date, which was approximately two weeks before trial. On that date appellant still had not completed its answers to the interrogatories filed by appellee nearly seventeen months earlier.

The choice of the appropriate sanctions is for the trial court, rather than the appellate court, and as long as such sanctions are within the authority vested in the trial court, they will not be overturned unless they constitute a clear abuse of discretion. U. S. Leasing Corp. v. O'Neill, Price, Anderson & Forchard, Inc., 553 S.W.2d 11 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ).

In our case the court could have concluded that there was a willful failure to make discovery or that appellant was acting in bad faith for the purpose of obstructing the discovery process. Although many cases hold that the primary purpose of sanctions is to insure that discovery is accomplished rather than to punish; Young Companies, Inc. v. Bayou Corporation, 545 S.W.2d 901 (Tex. Civ. App. Beaumont 1977, no writ); Ebeling v. Gawlik, 487 S.W.2d 187 (Tex. Civ. App. Houston [1st Dist.] 1972, no writ), the abuse of the discovery rules has caused a trend in federal and state courts toward using sanctions to deter violations of the rules by other litigants. See "The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions," 91 Harv. L. Rev. 1033 (1978). In National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 96 S.Ct. 2778, 49 L.Ed.2d 747, a federal district court dismissed plaintiff's cause of action for failing to timely file interrogatories. The Supreme Court of the United States, upholding this order said,

> ". . . the most severe in the spectrum of sanctions (dismissal or default) provided by the statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in absence of a deterrent."

Where there has been a willful refusal to allow discovery after being ordered to do so by the court, appellate courts have upheld severe sanctions by the trial court. G-K Properties and Genesco, Inc. v. Redevelopment Agency of the City of San Jose, 577 F.2d 645 (9th Cir. 1978) (dismissal of action after plaintiff failed to answer interrogatory), Harold Affonets v. Merrill Brothers, 547 F.2d 138 (1st Cir. 1977) (defendant defaulted after repeated orders of the court to answer interrogatories), Firestone Photographs, Inc. v. Lamaster, 567 S.W.2d 273 (Tex. Civ. App.—Texarkana 1978, no writ) (default judgment as to liability and for damages as pled, without proof); Ramsay v. Santa Rosa Medical Center, 498 S.W.2d 741 (Tex. Civ. App.—San Antonio 1973, cert. den. for want of jurisdiction, 94 S.Ct. 3062 (dismissal of plaintiff's cause of action), Thomas v. Thomas, 446 S.W.2d 590 (Tex. Civ. App. Eastland 1969, writ ref'd, n.r.e.) (default judgment for plaintiff where defendants refused to appear for deposition).

The facts in our case, more so than in any of the ones cited above, show a necessity for prompt answers to interrogatories.

Under the circumstances, the trial court did not abuse its discretion by striking the appellant's answer, and by refusing to allow it to present its grounds of defense, or by failing to set aside its previous order.

Appellant's fourth point of error alleges the trial court erred and abused its discretion in granting appellee's motion for interlocutory default judgment.

This motion was heard approximately one week before trial. The court had before it all of the evidence, up to that time, concerning the refusal of appellant to make prompt discovery, as well as the discovery which had been effected. Only six days before, appellant finally completed and tendered the remaining answers to interrogatories propounded over seventeen months earlier. The court had the authority to determine whether the sanctions previously imposed were sufficient or whether justice under the circumstances required an additional sanction. The specific sanctions which a trial court may impose under 215(c) are necessarily cumulative and not alternative as urged by appellant. The imposition of one is not a bar to the imposition of another. The record is such that the court could have concluded that the appellant's course of conduct prevented appellee from proving her cause of action, therefore, appellee should not be required to prove liability. This was not an abuse of discretion.

Appellant's final point of error asserts that the trial court erred and abused its discretion in overruling appellant's motion for reconsideration of the court's prior orders striking appellant's pleadings, prohibiting it from presenting any ground of defense, and granting an interlocutory default judgment.

This motion was heard and denied on December 11, 1978, one day before trial. The motion reiterated the history of the events leading to the sanctions and urged the court to set aside the sanctions. There is no record

of any evidence being offered except an unsworn statement of E. W. Buckles stating that the motorcar was dismantled on June 18, 1976. The court did not err in refusing to set aside the sanctions imposed.

We initially overruled appellant's motion to include the depositions in the record, but after reconsideration allowed them to be filed. A review of the record, including the depositions, shows that the trial court could have concluded that the conduct of appellant was willful, in bad faith and that such conduct resulted in prejudice to the appellee. No abuse of discretion is shown.

The judgment is affirmed.

/s/ JAMES F. WARREN
Associate Justice

Associate Justices Peden and Evans also sitting.

Judgment rendered and opinion filed October 25, 1979.

APPENDIX B

TRIAL COURT'S ORDER OF SEPTEMBER 2, 1977

NO. 1,124,909

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
113TH JUDICIAL DISTRICT

VIOLET JO EVANS, TEMPORARY ADMINISTRATRIX OF THE ESTATE OF PAUL DAVID EVANS, DECEASED

vs.

SOUTHERN PACIFIC TRANSPORTATION COMPANY

ORDER

BE IT REMEMBERED that on the 22nd day of August, 1977, in the above entitled and numbered cause, came on for hearing Motion to Compel Answers to Interrogatories And For Other Relief with due and proper notice to all Parties, and thereupon came Plaintiff, by and through Plaintiff's attorneys of record, and came not Defendant, by and through Defendant's attorneys of record, and same Motion having been duly presented, heard and considered by the Court, the Court is of the opinion that the Motion should be granted. It is therefore

ORDERED by the Court that Defendant, SOUTHERN PACIFIC TRANSPORTATION COMPANY, shall file its Answers to Plaintiff's Interrogatories within thirty (30) days from the date this Order is signed; and it is further

ORDERED by the Court that the pleadings of Defendant, SOUTHERN PACIFIC TRANSPORTATION COMPANY, shall be struck and Defendant, SOUTHERN PACIFIC TRANSPORTATION COMPANY, shall not be permitted to present any grounds of defense if Defendant fails to file its Answers to these Interrogatories by such date.

DONE, SIGNED AND ENTERED on this 2nd day of September, 1977.

/s/ GEORGE E. MILLER
Judge Presiding

APPROVED:

SCHMIDT & MATTHEWS

By: /s/ JAMES H. BRANNON
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Telephone: 223-4466
Attorneys for Plaintiff

APPENDIX C

TRIAL COURT'S ORDER OVERRULING DEFENDANT'S MOTION TO SET ASIDE ORDER STRIKING PLEADINGS

NO. 1,124,909

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
113th Judicial District

VIOLET JO EVANS, TEMPORARY ADMINISTRATRIX OF THE ESTATE OF PAUL DAVID EVANS, DECEASED

vs.

SOUTHERN PACIFIC TRANSPORTATION COMPANY

ORDER OVERRULING DEFENDANT'S MOTION TO SET ASIDE ORDER STRIKING PLEADINGS

BE IT REMEMBERED that on the 27th day of November, 1978, came on to be heard Defendant's Motion to Set Aside Order Striking Pleadings and Response to Defendant's Motion To Set Aside Order Striking Pleadings and came the parties by and through their attorneys of record, and the Court, having duly considered the pleadings on file, the depositions and other discovery on file in the cause, authorities and the arguments of counsel, is of the opinion that the following Order should be entered. It is accordingly

ORDERED, ADJUDGED AND DEGREED that Defendant's Motion to Set Aside Order Striking Pleadings is overruled, that this Court's Order entered on September 2, 1977 is not set aside and that Defendant's pleadings in this cause are struck and Defendant shall not be permitted to present any grounds of defense in this cause.

To all of which Order and Judgment of this Court the Defendant duly excepted and gave Notice of Appeal to the Court of Civil Appeals.

SIGNED ON THIS 29th day of November, 1978.

/s/ GEORGE E. MILLER
Judge Presiding

APPROVED:

SCHMIDT & MATTHEWS

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Telephone: 713/652-8700
ATTORNEYS FOR DEFENDANT

APPENDIX D

JUDGMENT OF COURT OF CIVIL APPEALS

BE IT REMEMBERED

THAT at the term of the Honorable Court of Civil Appeals for the First Supreme Judicial District of the State of Texas, begun and holden at Houston on the 1st Monday of October, A.D. 1979, present TOM F. COLEMAN, Chief Justice, and Associate Justices PHIL PEDEN, FRANK G. EVANS, HENRY E. DOYLE, JAMES P. WALLACE and JAMES F. WARREN.

In the cause SOUTHERN PACIFIC TRANSPORTATION COMPANY, Appellant, No. 17427

vs.

From Harris County

Tr Ct #1,124,909

VIOLET JO EVANS, INDIVIDUALLY & TEMPORARY ADMINISTRATRIX OF THE ESTATE OF PAUL DAVID EVANS, DECEASED, Appellee the following judgment was rendered October 25, 1979:

"This cause, being an appeal from the judgment rendered and entered by the court below on December 27, 1978, came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the court below be in all things affirmed; that the appellees, Violet Jo Evans, Individually and as Temporary Administratrix of the Estate of Paul

David Evans, Deceased, and as the legal and personal representative of Sandra Coker, Janice Cain, Paul David Evans, Jr., and Brenda Evans, do have and recover of and from the appellant, Southern Pacific Transportation Company, and its surety, Fidelity and Deposit Company of Maryland, the sum or sums adjudged to them, together with the legal rate of interest from the date of the trial court judgment, until paid, and all their costs incurred, both in this Court and in the court below.

It is further ordered that this decision be certified below for observance. Judgment rendered by panel consisting of Justices Peden, Wallace and Warren."

I, MARIBELLE REICH, Clerk of the Court of Civil Appeals for the First Supreme Judicial District of Texas, at the City of Houston, hereby certify that the foregoing is a true copy of a judgment rendered herein by this Court in the above entitled and numbered cause as appears of record in Minute Book 16, Page 333.

IN WITNESS WHEREOF, I, hereunto set my hand and affix the seal of said Court at Houston this 18th day of September, A.D. 1980.

/s/ MARIBELLE REICH
Clerk

APPENDIX E

ORDER OF COURT OF CIVIL APPEALS OVERRULING MOTION FOR REHEARING

BE IT REMEMBERED:

THAT at the term of the Honorable Court of Civil Appeals for the First Supreme Judicial District of the State of Texas, begun and holden at Houston on the 1st Monday of October, A.D. 1979, present TOM F. COLEMAN, Chief Justice, and Associate Justices PHIL PEDEN, FRANK G. EVANS, HENRY E. DOYLE, JAMES P. WALLACE and JAMES F. WARREN.

In the cause, SOUTHERN PACIFIC TRANSPORATTION COMPANY, Appellant, No. 17427.

v.

From Harris County

Tr Ct #1,124,909

Opinion by WARREN, AJ

VIOLET JO EVANS, INDIVIDUALLY & TEMPORARY ADMINISTRATRIX OF THE ESTATE OF PAUL DAVID EVANS, DECEASED Appellee, the following order was entered November 9, 1979:

"It is ordered that appellant's motion for rehearing be overruled."

I, MARIBELLE REICH, Clerk of the Court of Civil Appeals for the First Supreme Judicial District of Texas, at the City of Houston, hereby certify that the foregoing

is a true copy of an ordered entered herein by this Court in the above entitled and numbered cause as appears of record in Minute Book 16, Page 346.

IN WITNESS WHEREOF, I, hereunto set my hand and affix the seal of said Court at Houston this 18th day of September, A.D. 1980.

/s/ MARIBELLE REICH
Clerk

APPENDIX F

ORDERS OF THE SUPREME COURT OF TEXAS REFUSING APPLICATION FOR WRIT OF ERROR AND OVERRULING MOTION FOR REHEARING

IN THE SUPREME COURT OF TEXAS

No. B-9075 May 28, 1980

SOUTHERN PACIFIC TRANSPORTATION COMPANY

vs.

VIOLET JO EVANS ET AL

From HARRIS County,

FIRST District.

Application of petitioner for writ of error to the Court of Civil Appeals for the First Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant Southern Pacific Transportation Company, and its surety Fidelity and Deposit Company of Maryland, pay all costs incurred on this application.

No. B-9075 June 25, 1980

SOUTHERN PACIFIC TRANSPORTATION COMPANY

vs.

VIOLET JO EVANS ET AL

From HARRIS County,

FIRST District.

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby ceritfy that the above and foregoing is a true and correct copy of the order of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 17th day of September, 1980.

GARSON R, JACKSON, Clerk

By /s/ RICHARD P. BRAUN, Deputy.
Richard P. Braun

CERTIFICATE OF SERVICE

I, Ben G. Sewell, a member of the Bar of this Court, do hereby certify that on September 23, 1980, three (3) copies of the foregoing Petition for Writ of Certiorari were sent by certified mail, return receipt requested, to W. Douglas Matthews and James H. Brannon, counsel of record for Respondents, at Schmidt, Matthews & Brannon, 810 Houston Bar Center Bldg., 723 Main Street, Houston, Texas 77002, in compliance with Rules 19.3 and 28.5(b) of the Rules of the Supreme Court of the United States.

BEN G. SEWELL

Supreme Court, U. S.
FILED
OCT 27 1980
MICHAEL RODAK, JR., CLERK

NO. 80-473

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioner

v.

VIOLET JO EVANS, INDIVIDUALLY AND AS TEMPORARY ADMINISTRATRIX OF THE ESTATE OF PAUL DAVID EVANS DECEASED, ET AL.,
Respondents,

On Petition For Writ Of Certiorari To The Court Of Civil Appeals For The First Supreme Judicial District Of Texas

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM 1980

NO. 80-473

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioner

v.

VIOLET JO EVANS, INDIVIDUALLY AND AS TEMPORARY ADMINISTRATRIX OF THE ESTATE OF PAUL DAVID EVANS DECEASED, ET AL.,
Respondents,

On Petition For Writ Of Certiorari To The Court Of Civil Appeals For The First Supreme Judicial District Of Texas

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BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Whether the due process clause of the Fourteenth Amendment of the United States Constitution is violated due to alleged lack of proper notice even though all parties are present at a hearing and are fully aware of the possible outcome.

OPINION BELOW

The opinion of the Court of Civil Appeals for the First Supreme Judicial District of Texas, rendered on October 25, 1979, is reported at 590 S.W.2d 515.

JURISDICTION

The Court should deny this Petition for Writ of Certiorari for lack of jurisdiction due to two separate procedural errors committed by Petitioner below.

First, Petitioner failed to raise the issue of the alleged denial of the federal right of due process in the Texas state courts. The threshold procedural requirement for review by this Court is that the federal issue must have been raised in the state courts. *Cardinale v. State of Louisiana,* 394 U.S. 437 (1969). Since this requirement is jurisdictional, the burden of proof as to whether the federal question was presented to the state courts rests on the Petitioner. *Street v. State of New York,* 394 U.S. 576 (1969). Petitioner has wholly failed to meet its burden. In the jurisdictional section of its Petition, Petitioner nowhere points out where it allegedly raised the issue of denial of federal due process below.

The due process argument of Petitioner was an afterthought that first appeared on page four of its Motion For Rehearing in the Court of Civil Appeals for the First Supreme Judicial District of Texas. Petitioner there used the words "due process" but never alleged the denial of due process under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. When one looks at the manner in which Petitioner argued the alleged denial of due process in the Texas state courts, it is clear that it was presenting a *state* due process argu-

ment. Petitioner made vague references to the denial of due process but never mentioned the U.S. Constitution or even hinted that it was a denial of a federal right as opposed to a state right of which it complained.

This very issue of failure to specify the denial of a federal right has already been decided by this Court in *Bowe v. Scott,* 233 U.S. 658 (1914). *Bowe* involved an appeal through the state courts of Virginia by plaintiffs who sought to enjoin the enforcement of a city ordinance that would close an alley. Plaintiffs alleged United States Supreme Court jurisdiction because of alleged denial of due process. However, this Court found that it was never alleged in plaintiff's pleadings in the Virginia state courts that there had been a denial of the federal constitutional right of due process. Writing for the Court, Chief Justice White said:

> "But it is settled that such an averment, making no reference to the Constitution of the United States, and asserting no express rights thereunder, is solely referable to the state Constitution, which, in this instance, has a due process clause, and affords no basis whatever for invoking the jurisdiction of this court. *Miller v. Cornwall R. Co.,* 168 U.S. 131, 42 L.Ed. 409, 18 Sup. Ct. Rep. 34; *Harding v. Illinois,* 196 U.S. 78, 49 L.Ed. 394, 25 Sup. Ct. Rep. 176." 233 U.S. 658, 665.

Since Article 1, Section 19 of the Texas State Constitution contains a due process clause, it is clear that Petitioners broad statements concerning denial of due process refer to state due process rather than federal. The *Bowe* case has been repeatedly followed by the U.S. Supreme Court in cases dealing with jurisdictional issues similar to that of the case at bar. *Wilson v. McLane,* 279

U.S. 822 (1928); *American Trust Co. v. McNinch,* 261 U.S. 606 (1922); *Armour & Co. v. New York, New Haven & Hartford R.R. Co.,* 250 U.S. 651 (1919); *O'Brien v. Public Service Commission of First District of New York,* 251 U.S. 537 (1919); *State of Missouri ex rel St. Joseph Hospital v. Geiger,* 235 U.S. 695 (1914); *Caldwell v. Bauer,* 238 U.S. 607 (1914). And since *Bowe* has never been overruled or distinguished on the points of jurisdiction and failure to state a denial of federal constitutional rights, it is clearly still the law.

Even if this Court were to hold that Petitioner had raised a federal rather than a state constitutional issue, Petitioner committed a second procedural error which, standing alone, is also sufficient to deprive this Court of jurisdiction in this matter. A claim of denial of federal rights under the United States Constitution is not adequately preserved if it is not presented to the state appellate courts in timely fashion with the clarity required by state appellate procedure. *Beck v. State of Washington,* 369 U.S. 541, 549-54 (1962). In order to have an issue considered by a Texas appellate court, state appellate procedure requires that it be stated in the brief as a point of error. Merely raising the issue as an argument without assigning it as a point of error is not sufficient. *Dial Temp Air Conditioning Company v. Faulhaber,* 340 S.W.2d 82 (Tex. Civ. App., Dallas 1960, writ refused, n.r.e.). Petitioner's due process argument was never presented as a point of error in any brief or pleading in the trial court or two appellate courts that considered this case. As stated previously, Petitioner first raised this issue as an argument only in its Motion For Rehearing in the Court of Civil Appeals. It is clearly the law in Texas

that no point should be considered in an appellate court which is raised for the first time in a motion for rehearing. *Aycock v. Travis County,* 255 S.W.2d 910 (Tex. Civ. App., Austin 1953, writ refused). Consequently, the issue of denial of state or federal due process was never before the Texas Court of Civil Appeals. Likewise, the issue was never properly presented to the Texas Supreme Court. That Court may only consider those questions of law raised by points of error in an application for writ of error. Rule 476, Texas Rules of Civil Procedure; *State Farm v. Cowley,* 468 S.W.2d 353 (Tex. 1971). The "due process" argument was not raised to the dignity of a point of error in the Application For Writ Of Error in the Texas Supreme Court.

In summary, Petitioner failed to timely and clearly present its due process argument under Texas appellate rules and therefore may not now assert such an argument in this Court.

STATEMENT OF THE CASE

Respondents feel compelled to give a detailed statement of the case due to the inaccurate statement made by Petitioner in its Petition For Writ Of Certiorari.

This is a wrongful death case brought under the Federal Employers Liability Act, 45 U.S.C. § 51 et seq. There were five pre-trial hearings in this case dealing with discovery matters. The hearings were held on August 22, 1977; July 31, 1978; November 27, 1978; November 29, 1978; and on December 4, 1978. Three different judges presided at these hearings including the Hon. George Miller, Hon. Charles Betts and Hon. Jack Smith. No record was made of any of these hearings and the

evidence offered to the trial court, if any, is not before this court. At the December 4, 1978 hearing the trial court granted an Interlocutory Default Judgment against the Petitioner on liability.

Respondents' deceased, Paul David Evans, was a track extra gang foreman employed by the Petitioner and was operating a motor car owned by Petitioner on Petitioner's tracks on April 18, 1976, near Burke, Angelina County, Texas. While making an inspection of Petitioner's tracks on that date, at a speed of about 15 m.p.h., the motor car derailed and Mr. Evans was killed. No one was with Mr. Evans on the motor car and no one apparently witnessed the derailment. Respondents contended that the motor car was defective and that the defects caused this derailment. Immediately following this occurrence, Petitioner sent numerous employees to inspect the motor car and the tracks and, as was later revealed in its Answers to Plaintiff's Interrogatories, a "consulting expert" named Dr. William H. Tonn, Jr., was employed and was present for the purpose of "obtaining his opinion as to how the occurrence made the basis of Appellee's claim took place." Since there were no eye witnesses to the occurrence and Petitioner was in possession of all of the evidence (the damaged motor car, the names of its employees and others who made inspections of the motor car and the scene and all records concerning the motor car), it was essential that Respondents obtain this information by interrogatories and follow that with depositions and an examination of the damaged motor car by experts employed by Respondents in order to establish Respondents' cause of action. With this background, Respondents submit that the following course of events took place in the discovery phase of this case:

1. Respondents-Plaintiffs' First Interrogatories to Petitioner-Defendant Southern Pacific Transportation Company were filed on June 21, 1977. Interrogatories Nos. 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 29, 30, and 31 inquired in detail about witnesses, prior and subsequent inspections and repairs on the motor car, experts, and the location of the motor car. (Tr. 13)

2. Petitioner-Defendant filed no objections to these Interrogatories and failed to file its Answers within the sixteen (16) days required by the Interrogatories.

3. Respondents-Plaintiffs where then forced to file a Motion to Compel Answers to Interrogatories And For Other Relief and a hearing was held on August 22, 1977. The Court granted Respondents-Plaintiffs' Motion. (Tr. 22)

4. On September 2, 1977, the trial court entered its Order ordering Petitioner-Defendant to answer the Interrogatories within thirty (30) days from the date of the entry of the Order or its pleadings *would be struck* and Petitioner-Defendant would not be permitted to present any grounds of defense. (Tr. 28)

5. Petitioner-Defendant did not file any answers to these Interrogatories within the thirty (30) days provided by the Order or by October 2, 1977.

6. Respondents-Plaintiffs then got out a notice to take the oral deposition of Norris L. Hastings, Claim Agent for Petitioner-Defendant, who had indicated that he was present at the scene immediately following the occurrence, and his oral deposition was taken on November 18, 1977. Defendant's counsel instructed Mr. Hastings to refuse to answer all questions with respect to who was present at

the scene following the occurrence, who inspected or repaired the motor car, and the current location of the motor car. (Tr. 29)

7. On March 29, 1978, more than eight (8) months after Respondents-Plaintiffs filed their Interrogatories and almost six (6) months after October 2, 1977, the expiration of the thirty (30) day period provided by the trial court's Order, the Petitioner-Defendant finally filed its Answers to Respondents-Plaintiffs' Interrogatories. (Tr. 31)

8. In answer to Respondents-Plaintiffs' Interrogatories Nos. 30 and 31, Petitioner-Defendant then informed Respendents-Plaintiffs for the first time that the motor car in question had been destroyed by Petitioner-Defendant and that "parts of the car were salvaged for spare parts". (Tr. 38)

9. On November 27, 1978 a hearing on Petitioner-Defendant's Motion To Set Aside The September 2, 1977 Order was held. The trial court overruled Petitioner-Defendant's Motion and reaffirmed the September 2, 1977 Order striking Defendant's pleadings and prohibiting it from presenting any grounds for defense.

10. On December 4, 1978, following a hearing on November 30, 1978, the trial court entered an interlocutory default judgment against Petitioner-Defendant.

After a jury trial on damages only, judgment was entered for Plaintiffs in the amount of $233,000.00. Petitioner-Defendant then appealed to the Court of Civil Appeals for the First Supreme Judicial District of Texas. That Court affirmed the judgment of the trial court. (App. A in Petitioner's Petition for Writ of Certiorari).

Defendants then filed an Application For Writ of Error in the Texas Supreme Court, which was refused with the notation "no reversible error."

Contrary to Petitioner's Statement of the Case, at no time in any of the above proceedings did Petitioner ever allege a violation of the Due Process Clause of the United States Constitution. It is also noteworthy to point out another omission in Petitioner's Statement of the Case. Before pursuing its cause in this Court, Petitioner filed a Motion to Stay Execution on the Judgment in the Court of Civil Appeals for the First Supreme Judicial District of Texas following the decision of the Texas Supreme Court. In order for such a motion to be successful, the movant must first show that the risk of irreparable injury would weigh most heavily on it by forcing it to pay the judgment prior to the disposition of its Petition for Writ of Certiorari in this Court. Secondly, movant must show that it is likely that four members of this Court would vote to grant the writ. *Buchanan v. Evans,* ____U.S.____, 99 S.Ct. 28 (1978). Petitioner was unable to convince the First Court of Civil Appeals of either proposition and its Motion was denied. (App. A).

SUMMARY OF ARGUMENT

This Court lacks jurisdiction in this case for two reasons. First, Petitioner did not raise the federal constitutional question of denial of due process in the Texas appellate courts and therefore may not now do so. Secondly, in the state courts below Petitioner failed to raise its due process argument to the dignity of a point of error as required by state appellate procedure in order to preserve error.

Petitioner's claim is frivolous on the merits. It was well informed of all hearings in the trial court and well aware of the consequences and possible outcomes of the hearings. Petitioner at all times had an opportunity to be heard in a meaningful manner at a meaningful time.

ARGUMENT

Petitioner's case on the merits, apart from the jurisdictional questions, is frivolous and will not hold up under scrutiny. In essence, Petitioner argues that it had no notice that the trial court was going to strike its pleadings at the November 27, 1978 hearing. Petitioner is attempting to convince this Court that it was unprepared to defend against the possible confirmation of discovery sanctions even though the September 2, 1977 Order clearly set out the consequences of failing to answer the interrogatories within the prescribed time. Petitioner acknowledged the possibility of these consequences in its Motion To Set Aside Order Striking Pleadings.

In support of its argument, Petitioner is unable to cite a single case which indicates that the circumstances in the case at bar constitute a denial of due process. Instead, Petitioner cites cases such as *Mullane v. Central Hanover B & T Company*, 339 U.S. 306 (1950) and *New York v. New York, N.H. & H. RR. Co.*, 344 U.S. 293 (1953), in which this Court held that notice by publication was inadequate when other more reliable means were available.

Oddly enough, Petitioner also cites *Boddie v. Connecticut*, 401 U.S. 371 (1971), which supports Respondents' position here. In *Boddie*, this Court clearly articu-

lated its views on the meaning of the Due Process Clause of the Fourteenth Amendment:

> "Due process does not, of course, require that the Defendant in every single case actually have a hearing on the merits. A state can, for example, enter a default judgment against a defendant who, after adequate notice, fails to make a timely appearance, see *Windsor*, supra, 93 U.S. at 278, 23 L.Ed. 914, or who, without justifiable excuse, violates a procedure rule requiring the production of evidence necessary for orderly adjudication, *Hammond Packing Company v. Arkansas*, 212 U.S. 322, 351, 29 S.Ct. 370, 380, 53 L.Ed. 530 (1909). *What the Constitution does require is 'an opportunity . . . granted at a meaningful time in a meaningful manner,' Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965) (Emphasis added), *'for (a) hearing appropriate to the nature of the case,' Mullane v. Central Hanover Bank & Trust Company*, supra, 339 U.S. at 313, 70 S.Ct. at 657. *The formality and procedural requisites for the hearing can vary depending upon the importance of the interests involved and the nature of the subsequent proceedings.* 401 U.S. 371, 378. (Emphasis added).

Under the rules stated in *Boddie*, supra, it can hardly be said that Petitioner was denied *"an opportunity . . . granted at a meaningful time in a meaningful manner"* to be heard on the subject of having its pleadings struck and being prohibited from presenting any defenses. In short, Petitioner knew what was going to happen at the hearing on November 27, 1978 if its Motion To Set Aside Order Striking Pleadings was not granted. Petitioner tried to suggest that there may have been other evidence it would have presented had it been given notice of the nature of

the hearing and even suggests that "(i)t is Petitioner's contention that the cause of its failure to answer the interrogatories within the time prescribed by the September 2nd order was said counsel's mental condition during that period." It should be noted that there were at least four full hearings on this matter and that at no time did Petitioner or its counsel ever present any such evidence. The first time this claim was made was in Petitioner's Reply To Respondents' Reply To Application For Writ Of Error in The Texas Supreme Court. At that point, Respondents, of course, had no opportunity to cross-examine any witnesses who might have been produced on that subject. Petitioner filed motions and briefs for each of these four hearings but now wants to claim that it somehow did not get notice and therefore did not have the opportunity to be heard. Respondents respectfully suggest that such a contention is without merit and frivolous under the circumstances.

Considering that there are two separate and distinct bars to this Court's jurisdiction and that Petitioner's argument on the merits is totally frivolous, Respondents respectfully request that this Court exercise its statutory discretion under 28 U.S.C. § 1912 and award Respondents double their court costs and attorneys fees incurred in replying to the Petition For Writ Of Certiorari.

CONCLUSION

Respondents respectfully pray that the Writ be denied and that they be awarded double their costs of court and attorneys fees incurred in the preparation of this brief.

Respectfully submitted,

SCHMIDT, MATTHEWS & BRANNON, P.C.

By: _____

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Attorneys for Respondents

Of Counsel:

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CERTIFICATE OF SERVICE

I, James H. Brannon, a member of the Bar of this Court do hereby certify that on the_____day of October, 1980, three (3) copies of the foregoing Brief For Respondent In Opposition were sent by certified mail, return receipt requested to Ben G. Sewell, Gordon A. Holloway and John E. O'Neill, counsel of record for Petitioner, at Sewell & Riggs, 900 Captial National Bank Bldg., Houston, Texas 77002, in compliance with Rules 19.3 and 28.5(b) of the Rules of the Supreme Court of the United States.

_____

JAMES H. BRANNON

APPENDIX A

COURT OF CIVIL APPEALS
FIRST SUPREME JUDICIAL DISTRICT
Harris County Civil Courts Building
Houston, Texas 77002

July 16, 1980

Messrs. Sewell, Junell & Riggs
Hon. Gordon A. Holloway
900 Capital National Bank Bldg.
Houston, Texas 77002

Messrs. Schmidt & Matthews
Hon. Douglas Matthews
810 Houston Bar Center Bldg.
723 Main Street
Houston, Texas 77002

Dear Sirs:

Re: 17427, Southern Pacific Transportation Company v. Violet Jo Evans Indv. & Temporary Administratrix of the Estate of Paul David Evans, Deceased, from Harris

Please be advised the Court today DENIED appellant's motion to stay execution on judgment in the above cause.

Respectfully,

MARIBELLE REICH, Clerk

/s/ KATHRYN COX, Deputy

MR:kc